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IN THE

# Supreme Court of the United States

THEODORE B. GOULD,
*Petitioner*,

v.

UNITED STATES OF AMERICA, COMMISSIONER OF INTERNAL REVENUE, JOSE F. DELEON, RICHARD L. GRUBAUGH, BARBARA PETROHOVICH, WILLIAM MARTIN, CHARLES R. PINE, ANN M. WELHAF, AND OTHERS,
*Respondents*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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December 16, 2008

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## QUESTION PRESENTED

Does a district court have authority under the doctrine of sovereign immunity to dismiss a petition for the redress of grievances, filed for equitable relief, in which fraud and conspiracy are alleged against the United States, and government officers.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Theodore B. Gould, *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS OF OTHER COURTS

The opinion of the court of appeals (App. 1a) is unpublished. The court of appeals' denial of rehearing en banc has not been reported. The Memorandum Opinion and Order of the District Court, entered on October 16, 2007, (App. 3a) has not been reported.

The Opinion and Order of the District Court, entered on August 09, 2007, (App. 6a) has not been reported. The Opinion and Order of the District Court, entered on April 12, 2007, (App. 19a) has not been reported. The Opinion and Order of the District Court, entered on February 20, 2007, (App. 23a) has not been reported. The Order of the District Court, entered on August 10, 2006, (App. 28a) has not been reported.

## JURISDICTION

The judgment of the court of appeals was entered on June 04, 2008 (App. 2a), and a timely petition for rehearing en banc was denied on September 19, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) (1988).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, provides in part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . [and] to Controversies to which the United States shall be a party . . . .

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1331 of the Judicial Code provides:

> 28 U.S.C. §1331. Federal question.
>
> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

## STATEMENT

The limited explanation in this Court's modern precedent defining the procedural requirements for a district court to hear, and enter a judgment, with respect to a petition for the redress of grievances, is characterized in the following record:

1. On February 20, 2007, the district court granted a Fed. R. Civ. Rule 12 (b)(6) motion to dismiss[1] a complaint concerning the conduct of the defendants in administrative proceedings with respect to taxes, App. 23a, filed as a petition for the redress of grievances seeking equitable relief[2], which alleged with specific-

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[1] On May 5, 2006, the defendants filed a motion to dismiss, Doc. 21, which argued that (a) the court lacked subject matter jurisdiction over the complaint under the doctrine of sovereign immunity; and (b) claims against government officers must be dismissed under the "qualified immunity" doctrine because the response of the defendants to the petitioner's allegations that the defendant Commissioner made fraudulent misrepresentations of the Internal Revenue Code's provisions, the regulations promulgated thereunder, and this Court's opinion, *Holywell Corporation, et al. v. Smith*, 503 U.S. 47 (1992), and the commencement of an administrative criminal investigation, of which the petitioner was the subject, to avoid judicial review of a civil action concerning the taxable year 1997, was "official conduct".

[2] The district court's opinion was issued, without answer of the defendant to the complaint's allegations and without discovery, and was based on the conclusion that the court of appeals has adopted a transactional approach to determining

ity, in accordance with Fed. R. Civ. Rule 9(b)'s requirements, that the defendants United States, and government officers, engaged in a pattern of fraud commencing after the issuance of this Court's opinion that rejected the argument of the United States that "[a]t confirmation . . . the bankruptcy plan substituted the trustee for Gould but did not alter the bankruptcy estate," *Holywell Corporation, et al. v. Smith*, 503 U.S. 47, 56(1992), and held concerning "the trustee's duties with respect to the individual debtor Theodore B. Gould," *Id.* at 53, that "[w]e agree with the debtors that the trustee . . . is the fiduciary of a trust of an individual", *Id.* at 54, that fit the description of a liquidating trust under 26 CFR § 301.7701-4(d) created "for the express purpose of liquidating Gould's estate and distributing it to creditors", *Id.* at 56.

The complaint also sought a declaratory judgment under 28 U.S.C. § 2201 that in conformity with this Court's opinion, (a) the petitioner was the beneficial owner of the property transferred to the Miami Center Liquidating Trust and the taxpayer for whom the trustee was required to pay taxes as a fiduciary on the income attributable to the petitioner's property transferred to the Miami Center Liquidating Trust; (b) the corporate debtors Holywell Corporation and Miami Center Corporation, referred to in this Court's opinion, were liquidated, and terminated for tax purposes, on October 10, 1985 under the confirmed plan's "modified form of substantive consolidation", *In re Holywell Corp.*, 54 B.R. 41, 43 (Bkrtcy. S.D. Fla.

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the identity of claims and "*styling a case as 'equitable' rather than 'legal' does not permit a violation of this rule, especially as such nice distinctions were abolished nearly 70 years ago.* Fed. R.Civ. Proc. 2." (Emphasis added.). App 26a

1985), upon assignment of all of their property to the Miami Center Liquidating Trust, *see Miami Center Limited Partnership, et al. v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988)[3], the Internal Revenue Code's provisions and the applicable regulations promulgated thereunder for a corporation's liquidation upon assignment of its assets to a trust; and (c) the assessed taxes that the trustee was required to pay on the income attributable to the property, of which the petitioner was the beneficial owner, plus accrued interest from the time such taxes were due, must be credited to the petitioner's tax account.

The relief sought an order vacating part of the district court's prior judgment, cited as *Theodore B. Gould, et al. v. United States of America*, 84 A.F.T.R. 5497 (W.D.Va. 1999), and vacate, in its entirety, the court's prior order, *Holywell Corporation & Subsidiaries v. United States of America*, 82 A.F.T.R. 2d 98-6313 (W.D.Va. 1998), a proceeding in which a refund claim was filed in mistake based on the fraudulent misrepresentations of the defendant Commissioner that (a) the confirmed plan's substantive consolidation provision was not binding, and (b) Holywell was not liquidated, and terminated for tax pur-

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[3] The court of appeals dismissed as moot, the appeal of the bankruptcy court's order confirming the plan, proposed by the Bank of New York ("Bank"), under which the Miami Center Liquidating Trust was created, having affirmed the district court's conclusion that the bankruptcy court's "confirmation order and consolidation order were "intertwined and interdependent." *Id.* at 1552. *See, In re Holywell Corp.*, 911 F. 2d 1539, 1540 (11th Cir. 1990), *reversed for other reasons*, 503 U.S. 47 (1992)(Allegation of fraud is moot that the Bank procured confirmation of a plan that failed to provide for the payment of income taxes attributable to the liquidation of property under the plan's provisions.)

poses, on October 10, 1985 upon the assignment of the corporation's property to the Miami Center Liquidating Trust.[4]

2. On August 10, 2006, the district court denied the petitioner's Motion for Judicial Notice, Doc. 36, filed in reliance on Abbot, *Mistake of Fact as a Ground for Affirmative Equitable Relief*, 33 Harv. L. 603 Rev. (1910), on the ground that "Plaintiff asks the Court to take judicial notice of a 1910 Harvard Law Review article on the availability of equitable relief.[5] Plain-

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[4] Prior to August 1, 1986, the special rules for taxation of a trust to which the property of a corporation was assigned provided that "such [corporate] entity shall be treated as having been liquidated into a trust . . . in a liquidation to which section 333 of the Internal revenue Code of 1954 . . . applies, and . . . (i) any person holding an income interest in such entity shall be treated as a qualified electing shareholder, and (ii) the earnings and profits . . . of such entity shall be apportioned ratably among [such] persons." Thus, Holywell was liquidated, and terminated for tax purposes, upon the assignment of all, or substantially all, of its assets to the Miami Center Liquidating Trust on October 10, 1985, and did not have any tax liability attributable to the trustee's sale of the property of Chopin Associates and the Miami Center Limited Partnership on the same date, or thereafter. *See*, 26 CFR § 1.6012-2(a)(2) ("A corporation is not in existence after it ceases business and dissolves, retaining no assets, whether or not under State law it may thereafter be treated as continuing as a corporation for limited purposes connected with winding up its affairs, such as for the purpose of suing or being sued"). Thus, after October 10, 1985, "the trustee must pay the tax due on the income attributable to the individual debtor's property because § 6012(b)(4) require[d] him to make a return as the 'fiduciary' of a 'trust'." 503 U.S. at 52.

[5] *See*, Abbott, 33 Harv. L. Rev. at 622 (Equitable relief will be granted where there is fraud, a mistake was a mutual one as to a basic fact, or where it was unilateral one of which the defendants knew and took advantage.)

tiff's motion appears, in fact, to be an attempt to induce the Court to accept Plaintiff's theory of the case . . . ." App. 28a.

3. On April 12, 2007, the district court granted the petitioner's Fed. R. Civ. P. 60(b)(1), (3), (5), and (6) motion to vacate its prior judgment, and ordered the petitioner to file an amended complaint, not exceeding twenty pages, subject to the following conditions:

> This complaint should include (but not be limited to: 1) the amount of money Plaintiff seeks, 2) the legal justification for that award (e.g., tax refund[6], compensatory or punitive damages, etc.), 3) whether or not Plaintiff challenges the assessment of taxes or concedes that taxes paid by the Trustee for 1997-98[7] were in fact owed to the IRS by somebody, 4) if the assessment is challenged, the grounds therefore and a proposed alternative assessment, and 5) some allegation or explanation of the effect of Plaintiff's proposed tax changes on the rights of creditors[8] who were

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[6] *Compare*, 26 U.S.C. § 6511, Limitations On Credit Or Refund (A claim for a credit or a refund may be filed with respect to an overpayment.) Also, App. 25a ("this complaint purports to be a bill in equity rather than a suit at law challenging the calculation of taxes.")

[7] The trustee has not paid the assessed taxes, penalties and accrued interest, for 1997 and 1998.

[8] *Compare*, Restatement (2d), Trusts,. § 12, Comment a. Nature of interests of beneficiary and creditor ("The beneficiary of a trust has the beneficial interest in the trust property. A creditor as such has merely a personal claim against the debtor."); § 43, Persons Who May Be Beneficiaries ("A person who would have capacity to take and hold legal title to the intended trust property has the capacity to be a beneficiary of a trust of that property; ordinarily, a person who lacks capacity to hold legal title to property may not be a trust beneficiary"); and § 48,

> entitled to distributions from the Miami Center Liquidating Trust. Plaintiff shall include only those factual allegations which are strictly necessary to justify his claim, and may make those allegations in general terms[9] rather than spelling out each and every event by date. *Failure to submit a complaint complying with this order . . . will result in dismissal of the suit with prejudice.* (Emphasis added.) App. 21a.

4. On August 9, 2007, the court granted the defendants' motion to dismiss the amended complaint[10]

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Incidental Benefits ("Persons who may incidentally benefit in some manner from the performance of the trust and cannot enforce it . . . may have other rights, for example, as creditors.") Pursuant to the plan under which the Miami Center Liquidating Trust was created, a creditor with an undisputed, and allowed claim, had an enforceable contractual right against the trustee limited to payment of the principal amount of his claim, plus interest of 14.9%, within 45 days after October 10, 1985, and a creditor with a disputed claim had an enforceable right to require the trustee to establish a reserve for the payment of the principal amount of his claim in a Disputed Claim Fund, Art. VII. *See, Corbin on Contracts*, § 222 at 314-15 (New promise to pay debt discharged in bankruptcy); also, § 1374 (A contract illegal by statute is *void ab initio*; but the plan, under which the Miami Center Liquidating Trust was created, failed to satisfy the requirements of 11 U.S.C. § 1129 for failure to provide funds for the payment of income taxes attributable to the trustee's liquidation of the property transferred to the liquidating trust *Smith v. Bank of New York*, 161 B.R. 302, 307 (Bkrtcy. S.D. Fla. 1993).

[9] *Compare*, Fed. R. Civ.P. 9(b) ("In all averments of fraud, or mistake, the circumstances shall be stated with particularity.")

[10] The Fed. R. Civ. P. 12(b)motion to dismiss argued that (a) the court lacked subject matter jurisdiction and failed to state a claim upon which relief may be granted under a waiver of the sovereign immunity of the United States; and (b) "*Bivens* relief

filed in accordance with its prior order and concluded, without discovery, the testimony of witnesses, or documentary evidence, based on the argument of the defendants that:

> There have been numerous suits and decisions concerning the tax consequences of the bankruptcy of the Hollywell (sic) Corporation[11]. . . . After the bankruptcy estate was closed, the proceeds were placed in a liquidating trust, whose purpose was to sell the illiquid assets and distribute the proceeds to creditors[12]. . . . The Supreme Court decided that the trustee was required to file a return and pay the taxes. *Hollywell (sic) Corp., et al. v. Smith*, 503 U.S. 47 (1992).
>
> The Amended Complaint says that Plaintiff does not challenge the assessment of taxes. (Am. Comp. 5-6, identifying Plaintiff as "taxpayer"; Pl. Mot. Sum. J. at 21-22, docket #49). However, he argues that the "Responsible Person" doctrine[13]

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is not available where, as here, Congress has provided an alternate, statutory scheme for challenging official conduct.

[11] *Compare*, 503 U.S. at 58 ("The United States is not seeking from the trustee any taxes that became due prior to his appointment . . . . No tax liability becomes due under § 6151 until the time required for making those returns." Thus, Holywell Corporation did not incur preconfirmation tax liabilities as a consequence of the bankruptcy proceedings, and no court has entered a decision concerning Holywell's tax liabilities.

[12] As of October 10, 1985, the trustee had $38,273,052.55 in cash and U.S. Treasury Bills, of which only $1,006,021 was derived from the trustee's sale of the Miami Center and available for the payment of the claims of creditors against MCLP; the remainder of the trustee's payment of creditors was derived from the petitioner's funds.

[13] This Court held that the trustee was responsible for filing the tax returns under 26 U.S.C. § 6012 and payment of the

makes the trustee personally liable[14] for these taxes and requires him to pay them from his own pocket. (Am. Com. 15-16). Plaintiff argues, in essence, that this doctrine requires that the tax liability be shifted entirely from his account to that of the trustee, personally, thus rendering Plaintiff's liability almost zero while imposing a large tax bill on the trustee[15]. Plaintiff also argues that any tax payment which is derived from trust funds must be credited to his account because he is the "beneficial owner" of the trust. *Id.* at 15-18, 27. . . .

To summarize, Plaintiff argues that the assets of the trust belong to him, but the tax liability[16] incurred by that same trust belongs entirely to the trustee, personally. He objects to the trustee using trust assets to pay the taxes incurred by the trust[17], demanding that the trustee use his own

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taxes as a fiduciary under 26 CFR § 301.7701-6, 503 U.S. at 56 ("A fiduciary is a person who holds in trust an estate to which another has the beneficial title . . . and controls income of another . . . ").

[14] The trustee is personally liable under 26 CFR § 1.641(b)-2(a) for the payment of assessed taxes for 1997 and 1998 because prior to distribution and discharge, he had notice of his tax obligations and failed to exercise due diligence in ascertaining whether or not such obligations existed.

[15] *Compare*, *Blair v. Commissioner*, 300 U.S. 5, 12 (1937)("The one who is to receive the income as the owner of the beneficial interest is to pay the tax").

[16] The district court failed to make the distinction between the beneficial owner's liability as the taxpayer and the statutory duty of a fiduciary imposed under the Internal Revenue Code's provisions. *See*, 503 U.S. at 52.

[17] *Compare*, the rules applicable to a liquidating trust under 26 U.S.C. § 671:

> personal accounts to satisfy the liability.[18] (Footnote omitted.) Rather than sue the trustee for conversion[19], Plaintiff has sought refunds on his tax returns. The refusal of the defendants to refund[20] the money is the fraud which forms the basis of this suit.[21] App.___a.

5. On October 16, 2007, the district court denied rehearing and a Fed. R.Civ. P. 60(b)(1), (3), and (6) motion and held:

> Gould argues that the Government's sovereign immunity is abrogated by the principle of equitable restitution (footnote omitted). Equitable

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> Where it is specified in this subpart that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against the tax of the trust . . . in computing taxable income or credits against the tax of an individual . . . .(Emphasis added.)

[18] *Compare, Smith v. Bank of New York*, 161 BR. at 306. ("The bank agreed to indemnify the Trustee for any consequence of his implementation of the plan of reorganization, including, but not limited to, the tax consequences".)

[19] *Compare*, 161 B.R. at 307 ("the bank's representations concerning . . . the Trustee's obligations under the plan were materially false.")

[20] If the district court's jurisdiction in this case was based on a claim for refund, instead of 28 U.S.C. § 1331, the district court would have had jurisdiction under 28 U.S.C. § 1346.

[21] Fraud was alleged for falsification and misrepresentation of this Court's opinion which rejected the argument of the United States that the trustee was a fiduciary of a chapter 11 estate, 503 U.S. at 56, failure to credit to the petitioner's tax account the assessed taxes that the trustee was required to pay, and misrepresentation of the Internal Revenue Code's provisions.

restitution was, Gould argues,[22] recognized as an exception to the principle of sovereign immunity in *Bull v. United States*, 295 U.S. 247 (1935). It is doubtful that *Bull*[23] ever stood for the proposition Plaintiff asserts, but it is unnecessary to speculate what Bull may have meant because it has been clarified by the later decision of *United States v. Dalm*, 494 U.S. 596 (1990). In *Dalm*, the court explained:

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[22] The district court misconstrued the petitioner's argument that "[i]n the United States, the Supreme Court's opinions on the subject of sovereign immunity have been based on the distinction of whether restitution is a legal remedy under a law enacted by Congress, in which an express waiver of immunity must be granted, or an equitable remedy that would have been provided in the English Court of Chancery", Mot. For Rehearing, 14, quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1944)("Equitable relief in a federal court is of course subject to restrictions; the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery . . .") and the power of the Court of Chancery to hear a petition of right as a bill in equity "was equivalent to a waiver of immunity", Jaffe, *Suits Against Governments And Officers: Sovereign Immunity*, 77 Harv, L. Rev. 1, 4(1963), which was always granted because the Chancellor was "the keeper of his conscience", 3 Blackstone's Commentaries, 48. *See, Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-63(1803) ("In Great Britain the king himself is sued in the respectful form of a petition.").

[23] In *Bull*, this Court held, quoting *United States v. State Bank*, 96 U.S. 30 (1877)

> The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution . . . .

This case concerns "unjust administrative action."

> In sum, our decisions in *Bull* and *Stone*[24] stand only for the proposition that a party litigating a tax claim in a timely proceeding may, in that proceeding, seek recoupment of a related and inconsistent, but now time-barred tax claim relating to the same transaction. In both cases, there is no question that the courts in which the refund actions were brought had jurisdiction. To date, we have not allowed equitable recoupment to be the sole basis for jurisdiction. . . If any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress. 494 U.S. at 608, 610.
>
> In other words, Bull does not create an exception to the requirement of a waiver of sovereign immunity. It simply allows a court to hear a case that would otherwise be time barred in certain limited circumstances. App. 4a.

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[24] In *Stone v. White*, 301 U.S. 532 (1937), this Court held, citing *Moses v. Macferlan*, 2 Burr. 1005 (K.B. 1750) (Lord Mansfield), that the statutes for tax refunds are predicated on the equitable principles of assumpsit for money had and received, having concluded that "[i]ts use to recover upon rights equitable in nature to avoid unjust enrichment . . . and its control in every case . . . [is] by equitable principles . . . for the recovery of taxes erroneously collected." 301 U.S.at 534. This Court also held, quoting Justice Buller, that assumpsit is an "action . . . extended on the principle of its being considered a bill in equity." *Id.* Moreover, assumpsit is an action of contract, in which consideration is not a requirement, and is based on omission or nonfeasance, Holmes, *The Common Law* (1881) at 274-288, and Indebtitatus Assumpsit places a positive duty on the obligor to act, and differs from obligations, the breach of which constitutes a tort, where the duty is negative. Ames, *The History of Assumpsit*, 2 Harv. L. Rev., 63 (1888).

6. On June 4, 2008, a panel of the court of appeals affirmed the district court's dismissal of this petition for the redress of grievances, based on the panel's conclusion upon review of the record, submitted on May 29, 2008, that there was no reversible error[25], App. 2a.

## STATEMENT OF MATERIAL FACTS

The opinion of the court of appeals is based on the failure of the district court to require an answer in good conscience to the allegations in the complaint, which was filed as a bill in equity, authorize discovery, hear the testimony of witnesses, and review documentary evidence, causing the record on appeal to be based on fundamental errors and devoid of the following dispositive material facts concerning which there is no genuine issue:

1. The value of the assets transferred to the Miami Center Liquidating Trust on October 10, 1985 exceeded $ 400 million, and the principal amount of secured and unsecured claims was $ 274,066,622.

2. The petitioner was Holywell Corporation's sole stockholder. *See supra*, n. 4; *infra*, n. 30.

3. On July 14, 1992, the defendant Commissioner issued a report to the Miami Center Liquidating Trust's trustee, acting on behalf of Holywell Corporation & Subsidaries (the "Holywell Report) for the taxable years 1985[26] through 1991, in which tax liabili-

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[25] A "reversible error" is an error affecting the substantial rights of the parties. *Royal Ins. Co. v. Eastham*, 71 F. 2d 385, 387(2d Cir. 1934).

[26] Although the defendant Commissioner concluded that if Holywell's property was not recovered as "misappropriated" funds to satisfy MCLP's debts, "they should be characterized as corporate distributions" (emphasis added), *Holywell Report* at

ties and penalties were proposed against Holywell, in the amount of $19,144,938 and $5,743,481 respectively, for the fiscal year ended July 31, 1986 attributable to the trustee's sale of the property of Chopin Associates and the Miami Center Limited Partnership on October 10, 1985.

4. On December 16, 1992, the defendant Commissioner issued a report to the petitioner, on behalf of The Bankruptcy Estate of Theodore B. Gould (the "Bankruptcy Estate Report"), in which an alternative minimum tax liability of $1,218,732 for the tax year ended October 10, 1985 was proposed, and concluded that the transfer of the petitioner's assets to the Miami Center Liquidating Trust was a taxable event, for which a gain of $38,800,228 was incurred. *Bankruptcy Estate Report* at 18. Compare, 503 U.S. at 54 ("We agree with the debtors that the trustee is the fiduciary of a trust of an individual," and quoting 26 CFR § 301.7701-6, this Court held that the trustee fit the description of a "fiduciary" as "a person who holds in trust an estate to which another has the beneficial interest, or receives and controls income of another.").

5. On January 5, 1993, the defendant Commissioner issued a report to the trustee on the Miami Center Liquidating Trust ("Miami Center Liquidating Trust Report") and proposed tax liabilities of

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37 , the defendant Deleon negotiated the settlement with the trustee, which the bankruptcy court approved on September 30, 1993, based on the defendant Commissioner's "theory that Holywell Corporation, Miami Center Corporation . . . retain their status as separate entities for tax purposes . . . [and] Section 1399 of the Code provides that except for any case to which section 1398 applies no separate taxable entity shall result from the commencement of a case under title 11 of the Code." *Holywell Report* at 35.

$2,596,584 for the taxable year 1991 attributable to the petitioner's nontaxable return of capital contribution of $6,300,000 to the trustee on the grounds that the Miami Center Liquidating Trust did not have basis in the Miami Center Joint Venture, of which the petitioner was the individual general partner.

6. The trustee payment of the claims of creditors, in the amount of $30.2 million, for which the petitioner was legally liable, was not treated as a deductible income distribution under 26 U.S.C. § 661[27] in the year such payments were made.

7. The defendant United States relieved the trustee of personal liability and the statutory duty of filing tax returns for 1985 through 1992, compare 503 U.S. at 52, for which the trustee paid estimated taxes of $13,327,229 under the settlement that the bankruptcy court approved on September 30, 1993.

8. The Miami Center Liquidating Trust was terminated, and the trustee discharged on September 9, 1998.

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[27] *Compare, Bergan v. Commissioner*, 80 F. 2d 89, 91 (2d Cir. 1935) (The trustee's disbursements for a debtor's legal obligations are deductible as distributions, even though the trustee "did not pay the funds directly to the beneficiary"); *Chandler v. Commissioner*, 119 F. 2d 623, 628 (3d Cir. 1941) ("Substantial discharge of a legal obligation of the taxpayer represents for tax purposes a distribution to him"); and 26 CFR § 1.668(b)-1, *Credit For Taxes Paid By Trust*, which provides, in part: "(a) The taxes imposed on a complex trust for a taxable year which would not have been payable by the trust if amounts deemed under section 666 to have been distributed in the year had in fact been distributed in the year . . . are allowable as a credit against the tax of the beneficiaries . . . . (b) . . . Any excess over the total tax liability of the beneficiary is treated as an overpayment of tax by the beneficiary.

9. On March 22, 2001, the defendant Commissioner issued a *No Adjustments Letter*, to the Miami Center Joint Venture ("MCJV") for the taxable year 1997, with respect to the Partnership's final tax return, in which income was reported, in the amount of $57,638,444 to the Miami Center Liquidating Trust for the petitioner's estate as MCJV's individual general partner.

10. On May 29, 2001, the defendant Commissioner issued Income Tax Examination Changes, to Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust, for the taxable year 1997, with a corrected tax liability of $22,871,041 attributable to MCJV's distributable income of $57,638,444 and damages of $15,000,000 imposed on the Bank for negligent misrepresentation as the plan's proponent.

11. On December 31, 2001, the defendant assessed taxes of $8,672,291 against the trustee for the taxable year ended October 26, 1998 attributable to cancellation of debt income of $21,902,257 and interest income that the trustee failed to report on the Miami Center Liquidating Trust's final tax return filed for the taxable year ended September 9, 1998.

12. On October 24, 2002, the defendant Welhaf filed a motion to stay a civil action in the United States Tax Court concerning the tax year ended December 31, 1997, in which the question presented was whether the creditors of the various bankruptcy estates were the Miami Center Liquidating Trust's beneficiaries , and represented to the Tax Court that an administrative criminal investigation had been commenced, of which the petitioner was the subject, and the stay was sought because "[t]he facts, and transactions at issue in the criminal investigation are identical to those present in the instant proceeding.

All testimony, documents, evidence in this civil proceeding are directly related to the matters pending in the criminal matter."

13. On July 25, 2005, defendant Pine forwarded a report to the U.S. Justice Department, recommending that the petitioner be prosecuted for filing false claims for the years 1999 through 2002.[28]

14. The failure of the defendants to engage in actions to collect the assessed taxes for 1997 and 1998 has been based on the false representation of this Court's opinion that the creditors of the various bankruptcy estates were the grantors,[29] owners[30] and beneficiaries of the Miami Center Liquidating Trust.

15. On February 20, 1998, the trustee sold the petitioner's partnership interest in the Miami Center Joint Venture ("MCJV") for $187,500, in reliance on the defendant Commissioner's false representation that the "transfer of assets . . . on October 10, 1985 between the estate of T.B. Gould and the Miami Center Liquidating Trust . . . qualifie[d] as a sale or exchange of the individual estate's assets," *Bankruptcy Estate Report*, 6, and "[t]he gain on the transfer of the estate's assets to the Miami Center Liquidating Trust . . . [was] $38,800,228.00," *Id.* at 12;, the petitioner's general partnership interest in the Miami Center Joint Venture was valued at $61,199,605, *Id.*

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[28] Defendant Pine's report did not refer to 1997, for which the defendant Commissioner sought the stay and dismissal of the proceedings in the United States Tax Court.

[29] *Compare, Bixby v. Commissioner*, 58 T.C. 757 (1972)(A grantor is a person who creates a trust and retains "effective control" of the trust's corpus for the purpose of remaining in the same position that he was in before the trust's creation.)

[30] *Compare, supra* at n. 7.

at 17, upon transfer to the Miami Center Liquidating Trust on October 10, 1985.

16. The Amended Complaint filed in compliance with the order of the district court below was limited, subject to the court's threat to dismiss the case, to "clarify[ing]" the original complaint's allegations concerning the tax years 1997 and 1998 that (a) the applicable regulations and rules concerning liquidating trusts[31], have been intentionally misrepresented; (b) criminal fraud had been alleged against the petitioner to avoid judicial review in the United States Tax Court concerning the defendant Commissioner's Determination for 1997 that "[i]f it (Miami Center Liquidating Trust) was a liquidating trust for purposes of applicable regulations,[32] the beneficiaries/creditors must have been treated as the grantors and deemed owners of the trust".

17. The defendant Commissioner has falsely represented that the Miami Center Liquidating Trust "had no basis in Miami Center Joint Venture," *Miami Center Liquidating Trust Report*, January 5, 1993, to assess taxes of $2,176,636 on May 2, 1994 attributable to a return of capital contribution of $6,300,00 paid to

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[31] *See*, 26 CFR § 1.337-2 (applicable prior to August 1, 1986) (The shareholders of a corporation were treated as the beneficial owners of a liquidating trust upon the transfer of "all" of a corporation's assets to an independent trustee and the assignment did not cause the corporation to incur a corporate tax liability); also, Rev. Rul. 80-150, 1980-1 C.B. 316 (shareholders of a liquidated corporation are the beneficial owners of a liquidating trust created under 26 CFR § 301.7701-4(d) to dispose of a corporation's assets).

[32] *Compare*, 503 U.S. at 56 (The Miami Center Liquidating Trust fit the description of a liquidating trust under 26 CFR 301.7701-4(d).)

the trustee as a fiduciary, acting on the petitioner's behalf. Compare 26 U.S.C. § 1398(i). (Net operating losses, capital losses, and basis revest in the discharged debtor upon termination of the bankruptcy estate.)

18. The defendant Commissioner has falsely represented in the administrative proceedings concerning 1995-2002 that the settlement with the trustee, which the bankruptcy court approved on September 30, 1993, forfeited the petitioner's net operating loss and capital loss carryovers exceeding $102 million and that the Miami Center Liquidating Trust was a "Bankruptcy Trust" and "per the settlement agreement, no tax attributes remain to be carried over to any year as of October 10, 1985, after which time any losses belong to the Bankruptcy estate."

## REASONS FOR GRANTING THE WRIT

This petition raises important systemic and procedural issues concerning the fundamental constitutional guarantee to petition the Government for the redress of grievances, for which this Court's explanation in modern precedent of a district court's authority to hear, and enter a judgment, is warranted. The opinions of the lower courts are also in conflict with various decisions of this Court, and the opinion of another court of appeals.

### I. The Petition Clause Supersedes The Doctrine of Sovereign Immunity.

Although Professor Jaffe's critical opinion of the individual's rights under the Constitution was that "[n]ot only the petition of right but . . . some of the ground covered by montrans de droit, traverse, and bills in the Exchequer and Chancery became unavailable" in the United States, Jaffe, *Sovereign Immunity*,

77 Harv. L. Rev. at 19, and the courts below adopted the argument of the defendants that sovereign immunity is an absolute, and unlimited doctrine, under which a district court has the authority to limit the right of the individual to redress for damages against the United States, and Government officers, subject to the unequivocal express consent of Congress, this Court has held:

> The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." The right to petition is cut from the same cloth as the other guarantees of that amendment, and is an assurance of a particular freedom of expression.

*McDonald v. Smith*, 472 U.S. 479, 482 (1984).

This Court also held that "filing a complaint in court is a form of petitioning activity", *Id.* at 484. But "baseless litigation is not immunized by the First Amendment right to petition." *Id.*, citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983).

In *Creek v. Village of Westhaven*, 80 F. 3d 186, 192 (7th Cir. 1996), the Seventh Circuit Court of Appeals, citing *McDonald v. Smith*, held that "[a] lawsuit can be a form of constitutionally protected petition for redress of grievances."

If the intent of the First Congress is significant in considering the question presented, the persons who drafted the Bill of Rights understood that the word "sovereign" was applied to "the jura summi imperii, or that supreme, irresistible, absolute, uncontrolled authority," Tucker, *Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States* (1803), 48n.

5,[33] and the framers of the Constitution understood that "equity", in relationship to the law, meant:

> "[T]he correction of that, wherein the law (by reason of its universality) is deficient. For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted. And these are the cases, which, as Grotius expresses it, "lex non exacte definit, sed arbitrio viri permittit."

1 Blackstone's Commentaries, § 2, 61.

In *United States v. Lee*, 106 U.S. 196 (1882), this Court held, pertinent to the reliance of the district court on *Dalm*, 494 U.S. at 608-10 and the argument of the defendants, which have construed modern precedent concerning the doctrine of sovereign immunity to limit the rights of the individual, notwithstanding the damage done:

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[33] Judge Tucker's opinion was:

> [B]y the Constitution of the Federal Government, the legislative power is restrained within certain limits . . . . And since the powers of the Legislature are thus limited, it [follows that the Jura summi imperil, or that supreme, irresistible, absolute, uncontrolled authority . . . ] doth not reside in the legislature, nor in any other of the branches of the Government, nor in the whole of them united. For if it did reside in them, or either of them, there would be no limits, such as may be found in all the American Constitutions, to the powers of Government. The existence of such limits proves the existence of a higher power elsewhere; that is in the PEOPLE; in whom, and in whom, only, the rights of sovereignty remain . . . .

> Under our system the people . . . are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch . . . [T]here is no reason why deference to any person, natural or artificial, not even the United States, should prevent him using the means which the law gives him for the protection and enforcement of that right. 106 U.S. at 208.

Thus, this Court concluded:

> [T]he security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by the Constitution. *Id.* at 220.

Furthermore, in *Swann v. Board of Education*, 402 U.S. 1, 15 (1971), this Court held concerning a district court's equitable jurisdiction that "[o]nce a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies," and concluded, quoting *Hecht Co. v. Bowles*, 321 U.S. 321 (1945):

> The essence of equitable jurisdiction has been the power of the Chancellor to do equity and mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between private claims. 321 U.S. at 329-30.

The proper standard for the Constitution's imposition of duty on a federal court was explained in *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264 (1821), in which Chief Justice Marshall interpreted the Constitution's requirements under Article III, Section 2 as follows:

> It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given then to usurp that which is not given. The one or the other would be a treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. 19 U.S. at 404.

In this case, the question presented is whether a district court can rely on the doctrine of sovereign immunity to avoid deciding a petition for the redress of grievances, alleging that the United States, and Government officers, engaged in fraud[34] and conspiracy to misrepresent the Internal Revenue Code's provisions and this Court's Holywell opinion.

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[34] This Court has held that "[f]raud connotes . . . falsification, concealment, [and] misrepresentation," *Knauer v. United States*, 328 U.S. 654, 657 (1946). Collateral estoppel and res judicata are not adequate remedies for tampering with the judicial process.

## II. Consent is Waived for Judicial Proceedings Under The Petition Clause.

Although the First Amendment's Petition Clause does not extend to sham litigation that does not involve a bona fide grievance, the affirmance of the court of appeals of the lower court's reliance on *Dalm* to dismiss this case should be vacated, unless the record on appeal provided a basis to conclude, after the defendants answered the complaint's allegations in good conscience, and after discovery, that the respondents could not be held liable for fraud and misrepresentation of this Court's opinion, the Internal Revenue Code's provisions, and the regulations promulgated thereunder concerning liquidating trusts.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 808(1981), this Court held, quoting *Butz v. Economou*, 438 U.S. 78 (1978) that "[c]onstitutional lawsuits can be quickly terminated by federal courts . . . [u]nless the complaint states a compensable claim for relief . . . it should not survive a motion to dismiss . . . [and] damage suits concerning constitutional violations . . . can be terminated on a properly supported motion for summary judgment," 438 U.S. at 507-508.

This Court, however, held that "[d]amage actions against high officials were . . . 'important means of vindicating constitutional guarantees," 457 U.S. at 809, and adopted a "functional approach" to the application of the qualified immunity doctrine to reject derivative immunity for government officers. *Id.* However, the lower court did not resolve the question.

Whether government attorneys can assert derivative immunity for fraud and misrepresentations made in their official capacity concerning the Inter-

nal Revenue Code's applicable provisions and this Court's Holywell opinion.

> The question explicitly presented to the district court was:
>
> Whether it was fraud, or a mistake, for the defendants to misrepresent the Supreme Court's opinion, *Holywell Corporation, et al v. Smith*, 503 U.S. 47 (1992), and the rules concerning liquidating trusts promulgated under the Internal Revenue Code's provisions, in the determination of the petitioner's tax liabilities, which Fred Stanton Smith, as trustee of the Miami Center Liquidating Trust, was required to pay as "the fiduciary of a [liquidating] trust of an individual", 503 U.S. at 54.

The district court's Order granting the defendants' Fed. R. Civ. P. 12 (b) (1) and (6) motion to dismiss[35], filed on June 8, 2007, without discovery, the testimony of witnesses, review of the documentary evidence that the petitioner proffered, or a hearing, which the court of appeals affirmed, was:

> Plaintiff has not alleged, except by statements both conclusory and elliptical,[36] that he did not owe the taxes which the trustee paid from the

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[35] The district court judge construed his order granting the defendants' Fed. R. Civ. P, 12 motion to dismiss as "granting summary judgment to the United States", App. 4a. *Compare*, Fed. R.Civ. P. 56(c) (The defendants did not file a motion for summary judgment , no hearing was held, and lack of jurisdiction over the subject matter cannot be raised in a motion for summary judgment.)

[36] *Compare* App. 21a (The district court characterized the original 110 page complaint, consisting of 337 allegations, as "replete with irrelevant factual allegations and unnecessary detail")

> trust funds. Even if he had some chance of receiving the residue of the trust after creditors were paid in full[37] (which he has not pled), and even if this case were not barred by sovereign immunity, Plaintiff has not even shown that the IRS made an error in assigning both liability and payment of the taxes to the same account.[38] Where there is no error, there cannot possibly be fraud or conspiracy. (Emphasis added.) App. 18 a.

The problem in this case has been lack of a clear understanding in the courts below of (a) the procedural requirements for equitable pleading and (b) the constitutional scholarship concerning the historical

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[37] Attached to the petitioner's Motion for Rehearing and Motion to Vacate Opinion and Order, filed on August 17, 2007, was an excerpt of the bankruptcy court's Memorandum Decision, entered on December 19, 1985, which held:

> All undisputed claims, both secured and unsecured have either been paid or provided for in full together with 15 months interest. After reserving enough, even if the debtor losses every contention, to pay all claims still under litigation in other courts and after reserving $2.5 million to pay all fees incurred in this court, there still remains some $5.25 million presently in the estate . . . .
>
> These details are significant here for this reason. As matters now stand, Gould will receive the remainder of the estate (at least $5.25 million). Therefore, Gould alone is paying these fee applicants and the continuing litigation of the disputed claims is solely for his account.

The trustee had additional cash receipts of $21,289,493 after the court's Order was entered.

[38] *Compare*, the same district court judge's opinion dismissing the petitioner's refund claim "[b]ecause Theodore Gould's tax liability was determined in a settlement proceeding before a United States Bankruptcy Court in Florida, this matter is considered an issue previously litigated," *Gould v. U.S.* 84 A.F.T.R. 5497 (W.D. Va. 1999).

relationship of a petition of right submitted to the King in England and the First Amendment's Petition Clause.

The historical basis of the Petition Clause was clearly expressed in *Chisholm v. Georgia*, 2 U.S. (Dallas 2.) 419 (1793):

> We have indeed known petitions of right, montrans de droit, and even in process in the Exchequer. But the first is the style of entreaty; the second, being apparent upon the record, is so far a deduction from the royal title; the third . . . is applicable only where the charge is claimed against the Revenue; and all of them are widely remote from an involuntary subjection, of the Sovereign to the cognizance of his own Courts.

2 U.S. at 425. Justice Iredell's dissenting opinion, pertinent to this issue, was:

> The only remedy in a case like that before the Court, by which . . . a suit can be maintained against the crown of England, or could be at any period from which the common law, as in force in America, could be derived, I believe is that which is called a Petition of Right. 2 U.S. at 435-37.

There is a scarcity of this Court's modern precedent explaining the procedural threshold requirements for the district court's resolution of a petition for the redress of grievances and whether the court's exercise of jurisdiction in a case in equity under the Petition Clause is limited to issuance of a judgment, after the defendants answered the petitioner's allegations in good conscience and after discovery.

In *United States v. O'Keefe*, 78 U.S. (1 Wall.) 178 (1870), this Court explained the limits of an equitable pleading under the Petition Clause as follows:

> In England, it is easy to see that the method of redressing injuries to which the Crown is a party, would be different from the remedy adopted in this country in the case the United States be the aggressor, because of the principle underlying the English constitution that the King can do no wrong. On this account, although it would not do to issue mandatory process against the sovereign, yet the law being unwilling that private rights should be invaded in the conduct of public affairs and not redressed, has furnished the subject who is thus injured with a mode of obtaining redress . . . . The law allows him by petition to inform the King of the nature of his grievance, and "as the law presumes that to know of any injury and to redress it are inseparable . . . it then issues, as of course, in the King's own name, his orders to his judges to do justice to the party aggrieved." (3 Blackstone's Commentaries, 255). 78 U.S. at 183.

In the United States, this Court explained:

> [T]he law secures to the American citizen the right to prosecute his claim against the government in its courts . . . . And in one important particular the two proceedings are alike, for both end with the recovery of the judgments. After they are obtained, it depends in England on the Parliament, and in this country on Congress, whether or not they shall be paid. *Id.* at 184.

Moreover, the defendants could not rely on the statute of limitations under 26 U.S.C. § 6511(a), or laches, in this case because this Court has held:

> [A] suit in equity may lie though a comparable cause of action at law would be barred. If want of

> diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal because of a mere lapse of time.
>
> Equity will not lend itself to such fraud and historically has relieved against it.

*Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1945). In this case, the defendants initiated criminal proceedings, of which the petitioner was the subject, based on misrepresentation of this Court's opinion, the Internal Revenue Code's provisions, and regulations concerning liquidating trusts to delay judicial review for six (6) years of their misconduct, and the courts below dismissed a petition for redress of grievances based on the doctrine of sovereign immunity. [39]

This is a complex case, because this Court has held that "equitable recoupment" is based on the doctrine of assumpsit and is applicable to mitigate the statute of limitations when two assessments are inconsistent, resulting in overpayment, *Bull*, 295 U.S. at 261, "related" parties are involved, *Stone*, 301 U.S. at 537, and the various claims arise from the same transac-

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[39] In the district court, the defendants relied on this Court's opinion in *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) for their argument that under modern precedent, sovereign immunity is an absolute and unlimited doctrine which requires the express consent of Congress to sue the United States because "[w]aivers of the Government's sovereign immunity, to be effective, must be 'unequivocally expressed', *Irwin v. Department of Veterans Affairs* 498 U.S. 89, 95 (1990) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980) and *United States v. King*, 395 U.S. 1, 4 (1969)," and concluded that *Dalm* "substantially narrowed" the application of trust law under *Bull* concerning equitable recoupment.

tion, *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 299 (1946). Here, the trustee has not paid the assessed taxes for 1997 and 1998 because the respondent has failed to collect the taxes based on positions which misrepresented the Internal Revenue Code's provisions and this Court's *Holywell* opinion, and the defendant Commissioner has not credited to the petitioner's tax account the assessed taxes, which the trustee was required to pay, 503 U.S. at 52, plus accrued interest, from the time such taxes were due, *Id.* at 58, after an audit to determine whether an overpayment was made for the assessed taxes for the taxable years 1985 through 1992, 26 CFR § 1.668(b)-1. (Credit the trustee's payment of taxes to the beneficiary.)

The district court failed to resolve the threshold question of this equity pleading, which was whether this Court's *Holywell* opinion, the Internal Revenue Code's provisions, and the applicable regulations concerning liquidating trusts, required the defendants to treat the petitioner as the beneficial owner of the property transferred to the Miami Center Liquidating Trust, 503 U.S. at 54 ("the trustee was the fiduciary of a trust of an individual"), and credit to the petitioner's tax account the assessed taxes, plus accrued interest from the time such taxes were due, on the income attributable to the property, of which the petitioner was the beneficial owner, *Id.* at 56, or be held accountable for fraud and misrepresentation in the administrative proceedings concerning determination of the petitioner's taxes.

## CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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(917) 744-6470

December 16, 2008

# APPENDIX

**APPENDIX A**

[UNPUBLISHED]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 08-1007

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THEODORE B. GOULD,
*Plaintiff - Appellant,*

v.

UNITED STATES OF AMERICA; COMMISSIONER OF INTERNAL REVENUE SERVICE; JOSEPH DELEON; RICHARD L. GRUBAUGH; BARBARA PETROHOVICH; WILLIAM MARTIN; CHARLES PINE; ANN M. WELHAF; AND OTHERS,
*Defendants - Appellees.*

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Appeal from the United States District Court for the Western District of Virginia, at Charlottesville.
Norman K. Moon, District Judge.
(3:06-cv-00008-nkm)

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Submitted: May 29, 2008
Decided: June 4, 2008

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Before TRAXLER, GREGORY and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Theodore B. Gould, Appellant Pro Se.
Ivan C. Dale, United States Department of Justice, Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Theodore B. Gould appeals from the district court's orders: (1) dismissing his complaint in which he alleged conspiracy and fraud and sought a refund of taxes and compensatory damages, and (2) denying his motion for reconsideration of the order. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *See Gould v. United States*, No. 3:06-00008-nkm (W.D. Va. Aug. 9 & Oct. 16, 2007). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

[Filed Oct 16, 2007]

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Civil No. 3:06cv00008

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THEODORE B. GOULD,
*Plaintiff*,

v.

UNITED STATES OF AMERICA,
*Defendant*

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MEMORANDUM OPINION and ORDER

Judge NORMAN K. MOON.

This matter is before the Court on Plaintiff's Motion for Rehearing and Motion to Vacate, filed on August 17, 2007 (docket entry no. 52). Plaintiff requests that I reconsider my prior Order dismissing his suit, basing his request on various alleged legal errors. However, the arguments in Plaintiff's Motion restate the arguments that were previously discussed in my Memorandum Opinion. Plaintiff's arguments remain unpersuasive and therefore the Motion is denied.

STANDARD OF REVIEW

Plaintiff has requested a rehearing under Federals Rule of Civil Procedure 59, which grants the Court discretion to direct the entry of a new judgment. However, "a motion for a new trial in a nonjury case

or a petition for rehearing should be based upon manifest error in law or mistake of fact, and a judgment should not be set aside except for substantial reasons." 11 Wright, Miller & Kane, Federal Practice and Procedure § 2804 (Civil 2d ed. 1995). The decision whether to grant a motion to vacate under Federal Rule of Civil Procedure 60(b) is also at the discretion of the Court. *See*, 11 Wright, Miller & Kane § 2857.

## DISCUSSION

Plaintiff reasserts a number of issues previously discussed in my Memorandum Opinion granting summary judgment to the United States. Here, it is only necessary to discuss the issue of sovereign immunity, because if sovereign immunity applies all of Plaintiff's other arguments are nugatory.

Gould argues that the Government's sovereign immunity is abrogated by the principle of equitable restitution.[1] Equitable restitution was, Gould argues, recognized as an exception to the principle of sovereign immunity in *Bull v. United States.* 295 U.S. 247 (1935). It is doubtful that *Bull* ever stood for the proposition Plaintiff asserts, but it is unnecessary to speculate what *Bull* may have meant because it has been clarified by the later decision of *United States v. Dalm* 494 U.S. 596 (1990). In *Dalm,* the Court explained:

> In sum, our decisions in *Bull* and *Stone* stand only for the proposition that a party litigating a tax claim in a timely proceeding may, in that

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[1] Plaintiff labels his theory "equitable restitution" but the relevant Supreme Court cases use the phrase "equitable recoupment." I will assume Plaintiff is referring to equitable recoupment when he writes equitable restitution.

> proceeding, seek recoupment of a related and inconsistent, but now time-barred tax claim relating to the same transaction. In both cases, there was no question but that the courts in which the refund actions were brought had jurisdiction. To date, we have not allowed equitable recoupment to be the sole basis for jurisdiction. . . . If any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress.

494 U.S. at 608, 610. In other words, *Bull* does not create an exception to the requirement of a waiver of sovereign immunity. It simply allows a court to hear a case that would otherwise be time barred in certain limited circumstances. Consequently, as explained in my Memorandum Opinion, this Court is barred from hearing Gould's claims by sovereign immunity.

CONCLUSION

Plaintiff has failed to present any new arguments that indicate any error—legal or factual—was committed by this Court in its earlier Opinion. Therefore, Plaintiffs motion is hereby DENIED.

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: /s/ Norman K. Moon
NORMAN K. MOON
United States District Judge

October 16, 2007
Date

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

[Filed Aug 09, 2007]

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Civil Action No. 3:06-CV-00008

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THEODORE B. GOULD,
*Plaintiff*,

v.

UNITED STATES OF AMERICA, *et al.*,
*Defendants.*

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### OPINION AND ORDER

Judge NORMAN K. MOON.

This matter is before the Court on the Defendant's June 8, 2007 Motion to Dismiss. For the reasons given below, the motion is GRANTED.

### I. BACKGROUND

Theodore Gould seeks to hold numerous employees of the Internal Revenue Service ("IRS") liable for fraud and conspiracy, alleging that they have intentionally misconstrued a Supreme Court ruling, the Internal Revenue Code, and federal regulations concerning the collection of taxes.

There have been numerous suits and decisions concerning the tax consequences of the bankruptcy of the Hollywell Corporation, in which Plaintiff was sole shareholder. After the bankruptcy estate was closed, the proceeds were placed in a liquidating trust,

whose purpose was to sell off the illiquid assets and distribute the proceeds to creditors. There was considerable controversy over whether the trustee was required to file tax returns and pay the taxes on the income accruing to the trust assets. The Supreme Court decided that the trustee was required to file a return and pay the taxes. *Hollywell Corp. et al. v. Smith*, 503 U.S. 47 (1992). Since that time, Plaintiff has filed Form 1040's claiming enormous refunds based on the trustee's payment of taxes in compliance with *Hollywell*. These refunds have been repeatedly rejected, leading to several suits against the IRS.

I initially dismissed this latest action because it appeared on the face of the original 110 page complaint that Plaintiff sought to relitigate tax claims from 1992-93 which had been the subject of prior post-*Hollywell* litigation. Plaintiff moved for reconsideration on the grounds that this suit involved the years 1997-98, which had not been addressed in prior cases. In an abundance of caution, I permitted Plaintiff to file an amended complaint, limited to 20 pages, which was to include:

> 1) the amount of money Plaintiff seeks, 2) the legal justification for that award (e.g., tax refund, compensatory or punitive damages, etc.), 3) whether or not Plaintiff challenges the *assessment* of taxes or concedes that taxes paid by the Trustee for 1997-98 were in fact owed to the IRS by *somebody*, 4) if the assessment is challenged, the grounds therefore and a proposed alternative assessment, and 5) some allegation or explanation of the effect of Plaintiff's proposed tax changes on the rights of creditors who were entitled to distributions from the Miami Center Liquidating Trust.

Order, April 12, 2007 (docket # 42). Plaintiff's Amended Complaint was filed on May 11, 2007 (docket # 45).

The Amended Complaint says that Plaintiff does not challenge the assessment of taxes. (Am. Comp. ¶5-6, identifying Plaintiff as "taxpayer"; Pl. Mot. Sum. J. at 21-22, docket # 49). However, he argues that the "Responsible Person" doctrine makes the trustee personally liable for these taxes and requires him to pay them from his own pocket. (Am. Comp. ¶15-16). Plaintiff argues, in essence, that this doctrine requires that the tax liability be shifted entirely from his account to that of the trustee, personally, thus rendering Plaintiff's liability almost zero while imposing a large tax bill on the trustee. Plaintiff also argues that any tax payment which is derived from trust funds must be credited to his account because he is the "beneficial owner" of the trust. *Id* at 15-18, 27. Thus, he claims to have made large overpayments in the years when the trustee paid taxes, which entitle him to a refund. He also argues that the failure to grant this refund constitutes a conspiracy on the part of IRS employees to deny him money that is justly his.

To summarize, Plaintiff argues that the assets of the trust belong to him, but the tax liability incurred by that same trust belongs entirely to the trustee, personally. He objects to the trustee using trust assets to pay the taxes incurred by the trust, demanding that the trustee use his own personal accounts to satisfy the liability.[1] Rather than sue the trustee for

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[1] The trustee is apparently party to an indemnity agreement with the Bank of New York, so it would be the Bank which actually had to pay the taxes in the event that Plaintiffs theory

conversion, Plaintiff has sought refunds on his tax returns. The refusal of the Defendants to refund the money is the fraud which forms the basis of this suit.

Defendants have moved to dismiss under Rule 12(b)(1) and (6) on the basis of sovereign immunity, the Declaratory Judgement Act, the Federal Tort Claims Act, and 26 U.S.C.§ 7422, which governs claims for refunds. (Def. Mot. Diss., docket # 48). They have also urged dismissal because the Amended Complaint does not comply with my Order reopening the case.

## II. STANDARD OF REVIEW

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. Proc. 12(h)(3).

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint," not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir. 1999). In considering a Rule 12(b)(6) motion, a court must accept all allegations in the complaint as true and must draw all reasonable inferences in favor of the plaintiff. *See id.* at 244.

Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiffs obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl.*

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were accepted. (Am. Comp. 31). This is irrelevant to the analysis which follows.

*Corp. v. Twombly*, _U.S._ 127 S. Ct. 1955; 167 L. Ed, 2d 929 (2007) (alteration in original omitted) (citations omitted) (internal quotation marks omitted). Instead, "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citation omitted) (footnote call number omitted). Rule 12(b)(6) does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face"; plaintiffs must "nudge[] their claims across the line from conceivable to plausible" or "their complaint must be dismissed." *Id.* at 14. As the Fourth Circuit has held, a plaintiff "must sufficiently allege facts to allow the Court to infer that all elements of each of his causes of action exist." *See Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 344-45 (4th Cir. 2006), *reh'g en banc denied*, 467 F.3d 378 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2036 (2007).

## III. DISCUSSION

*a) Standing*

Defendants argue that the Amended Complaint does not clarify whether Plaintiff challenges the IRS assessment of taxes, and further does not explain the consequences to creditors of accepting his arguments. Because these explanations were required by my Order reopening the case, Defendants argue that the Amended Complaint is deficient on its face and should be dismissed on that ground alone. I find that, although ambiguous, the Amended complaint does concede that the IRS assessment of the amount of taxes was correct. (Am. Comp. ¶15-18). However, Plaintiff has done nothing to clarify the second point. The question is whether the trustee's use of trust funds to pay taxes resulted in a loss to Plaintiff, be-

cause the trust had enough assets to pay creditors in full with some left over, or whether it would have resulted in a loss to the creditors, who were forced to accept less than full payment and might have gotten more but for the tax payments. Plaintiff has repeatedly asserted that he, not the creditors, was the "beneficial owner" of the trust, (Am. Comp. ¶67) but that title is meaningless if his debts exceeded his assets.

In order to have standing to bring a suit in federal court, a party must demonstrate actual injury, causation of the injury by the defendant, and redressability by court action. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). If the Plaintiff has suffered no loss because his creditors were entitled to the money in issue, then he lacks standing to bring a suit *even if the IRS conduct was illegal* because he has not been injured. *Id.* Lack of standing is a jurisdictional defect, and therefore the burden is on the plaintiff to "clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements." *Id.* When a litigant fails to plead sufficient facts to establish standing, then the court is "powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Id* at 155-56.

Despite my specific guidelines intended to assist a pro-se litigant in addressing the standing question, Plaintiff has failed to establish, or even allege, that he has suffered an injury sufficient to give him standing to sue, and this Court is therefore deprived of jurisdiction.

*b) Suits Against Individuals*

Defendants have pled sovereign immunity, as discussed more fully below. However, individual defendants are not necessarily immune merely because

they are employed by the government. For instance, a Bivens action permits recovery against government agents personally. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). However, if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [g]overnment from acting, or to compel it to act," then a suit naming an individual is actual properly brought against the United States. *Dugan v. Rank*, 372 U.S. 609, 620 (1963)(quotes and citations omitted). Here, victory for plaintiff would require the Treasury to pay him millions of dollars as a tax refund, making this a suit against the government, not the named employees.

Furthermore, suits against individuals are explicitly prohibited in the income tax context by 26 U.S.C. § 7422(h). The only proper defendant in this case is the United States.

*c) Sovereign Immunity*

The United States, as a sovereign, enjoys immunity from suit unless it gives its express consent. *United States v. Testan*, 424 U.S. 392, 399 (1976). This immunity is jurisdictional, depriving a court of all power to hear the claim. *See United States v. Sherwood*, 312 U.S. 584, 586-87 (1941). Such consent, when embodied in statute, must be strictly construed in favor of the sovereign. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). Therefore, a court may only entertain actions which fit easily within waivers and may not stretch the language beyond what it clearly says. *Id.*

The Amended Complaint seeks 3 forms of relief: declaratory judgment (Am. Comp. at 20, *See also* Pl.

Mot. Sum. J at 2), refunds of taxes paid (Am. Comp. at 20), and compensatory damages. *Id.* The Plaintiff has not discussed the corresponding statutory provisions waiving sovereign immunity for these sorts of claims. None of them allow a waiver in this case.

The Declaratory Judgment Act, 28 U.S.C. § 2201, explicitly declines to create jurisdiction for Federal tax suits except in the limited case of actions authorized by 26 U.S.C. § 7428 (concerning non-profit corporations). Thus, this Court lacks subject matter jurisdiction for a declaratory judgment action related to individual tax liability. Even if such jurisdiction existed in the abstract, there is no waiver of sovereign immunity which would allow a declaratory judgment in a tax case.[2]

Suits for tax refunds are an explicit exception to sovereign immunity, found in 26 U.S.C. § 7422. Jurisdiction for such suits is founded on 28 U.S.C. § 1346. They are not, however, authorized at just any time or place, without restriction. Defendant has summarized the restrictions in as succinct a fashion as is possible:

> The taxpayer first must file a claim for refund. 26 U.S.C. § 7422(a). The claim must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever is later. 26 U.S.C. § 6511(a). The suit must be brought within two years after the claim has been denied. 26 U.S.C. § 6532(a)(1). As plain-

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[2] Compare 28 U.S.C. § 1331, which creates jurisdiction for federal questions, but does not operate as a blanket waiver of sovereign immunity. *Randall v. United States*, 95 F.3d 339 (4th Cir. 1996). Both ordinary jurisdiction and waiver are necessary for a suit against the sovereign.

> tiff has alleged no facts which show he has met these requirements, he cannot maintain an action for refund.

(Def. Mot. Dis. at 8). The refund action is barred as failing to comply with the terms of the waiver of sovereign immunity.

Plaintiff also seeks a compensatory damages award of $25,000,000. He does not give the grounds for this claim, leading Defendant to assume that he seeks them as part of a common-law tort claim. (Def. Mot. Dis. at 8). Plaintiff replies that they are actually equitable claims and quotes a section of Prosser's famous hornbook on torts to the effect that fraud may result in rescission of a contract and restitution. (Pl. Mot. Sum. J at I 1-12, n. 15) To the extent that Plaintiff seeks to avoid the strictures of the Federal Tort Claims Act, he fails, because if equitable tort claims are truly distinct from common-law tort claims (which I do not decide), they would require their own waiver of sovereign immunity apart from the FTCA. Plaintiff offers no authority which suggests that such a law exists. On the other hand, to the extent his claims are indeed common-law torts, they are explicitly barred by 28 U.S.C. § 2680(c) (prohibiting tax litigation under the FTCA).

Plaintiff claims that cases brought in equity are not subject to sovereign immunity. If true, this principle would eliminate sovereign immunity as a viable doctrine, as plaintiffs invoked equitable remedies for all possible harms. However, the cases cited by Plaintiff do not support his contention.

In *United States v. State Bank*, 96 U.S. 30 (1877), the Supreme Court considered whether a bank could sue the sovereign when the actions of a government

official had defrauded the bank of gold and gold certificates to cover that official's embezzlement of government funds. The actions taken by the United States, described in the opinion, were essentially private transactions of the sort all banks engaged int, performed according "to the settled and usual course of business." *Id* at 33-35. The Court held that, under these circumstances, "the rules of law applicable to individuals [should be] applied to the United States. Its sovereignty is in no wise involved." *Id* at 36. Further, the agents involved in the State Bank fraud were clearly exceeding the scope of their duties, which certainly did not run to defrauding the public; an agent, the Court held, could confer no rights on his principal by fraud. *Id*. Such a result cannot obtain in a tax lawsuit, because the levying of taxes, if attempted by private parties, would be extortion; it is the character of the sovereign as sovereign which permits tax collection and therefore also protects it with sovereign immunity. Further, because the individual defendants here are not alleged to have done anything other than administratively assign collected taxes to a particular account, they cannot be said to have exceeded the scope of their agency.

Plaintiff can have no more success with *Bull v. United States*, 295 U.S. 247 (1935). There, after accepting payment of estate taxes in 1921, the United States decided to change the classification of nearly $200,000 from principal, subject to the estate tax, to income, subject to income tax. *Id* at 251-52. The plaintiff paid the income tax and sued for a refund. *Id* at 253. The plaintiff argued, and the Supreme Court agreed, that the money was being doubly taxed, having been counted as part of a trust corpus for estate tax purposes in 1921, but in 1925 as income for income tax purposes. *Id*. The Supreme Court explic-

itly acknowledged that an independent action for a refund of the estate taxes was barred by the statute of limitations, but allowed a set-off of the erroneous estate taxes against the new income tax claim. *Id* at 261. It was, after all, the Commissioner of Internal Revenue, and not the taxpayer, who had decided to change the classification of the money in question. Clearly, it would have been inequitable to allow double dipping of this sort, and the Court said so. *Id* at 261-62. The words "sovereign immunity" do not appear in *Bull,* because, unlike this case, it was brought in the proper court and at the proper time, and apparently complied with all necessary conditions to achieve a waiver of sovereign immunity.

Plaintiffs citation of his First Amendment right to petition the government for redress of grievances does not achieve a waiver of sovereign immunity in light of the cases, cited above, demanding an unambiguous waiver, to be strictly construed. He certainly has every right to complaint to the government about his taxes, but he cannot maintain a suit in the absence of jurisdiction.

Sovereign immunity deprives this Court of jurisdiction to hear cases such as this one.

*d) The "Responsible Person" Doctrine*

Finally, Plaintiff's cause of action is fundamentally flawed because it relies on an erroneous legal premise. Plaintiff accuses government employees of misconduct because they failed to assign tax liability solely to the trustee and credit Plaintiff for payments made by the trustee. Without citing any authority, he asserts that the "Responsible Person" doctrine makes the trustee personally liable for his taxes.

In the absence of authority, I cannot be certain upon exactly what legal principle Plaintiff relies to show that a tax liability, justly imposed upon him, should be shifted entirely onto another with no liability remaining on himself. To be sure, a trustee who behaves so irresponsibly as to incur unnecessary costs to the trust might be held personally liable by the beneficiaries. *See, e.g.*, Va. Code § 26-5. Such a suit would be brought against the trustee, not the IRS, and the underlying liability would not be abated.

The term "responsible person" does appear in tax cases in connection with 26 U.S.C. § 6672. *See, e.g. Plett v. United States*, 185 F.3d 216 (4th Cir. 1999). The person referred to is a corporate officer responsible for collecting and remitting taxes withheld from employee paychecks to the IRS. 26 U.S.C. § 6672(a). Such taxes are sometimes referred to as "trust fund taxes" because they are held in corporate accounts "in trust" for the United States. *Plett*, 185 F.3d at 218. When a responsible person willfully fails in his duty to the IRS, he can be held liable for a penalty equal to the full amount of the taxes paid. 26 U.S.C. § 6672(a).

This doctrine has no application to this case. As *Plett* makes clear, the "trust fund" is not a trust in the conventional sense, involving a grantor and trustee, but an account maintained by a corporation pending the disbursement of the money to the government. There has been no mention in this case of withholding of employee taxes. The right of action created by this doctrine belongs to the IRS, which can obtain money from the responsible persons, and to private parties seeking refunds from the IRS. Finally, payment of the penalty by the responsible person will not abate the taxes owed by the corporation. *Otte v.*

*United States*, 419 US 43, 53 (1974) (penalty imposed "apart from tax").

Plaintiff has not alleged, except by statements both conclusory and elliptical, that he did not owe the taxes which the trustee paid from trust funds. Even if he had some chance of receiving the residue of the trust after creditors were paid in full (which he has not pled), and even if this case were not barred by sovereign immunity, Plaintiff has not even shown that the IRS made an error in assigning both liability and payment of the taxes to the same account. Where there is no error, there cannot possibly be fraud or conspiracy. He has thus failed to state a claim on which relief can be granted.

## IV. CONCLUSION

This Court lacks subject-matter jurisdiction to hear this case, both because of lack of standing and because of sovereign immunity. Plaintiff has also failed to state a claim on which relief can be granted. The Defendant's Motion to Dismiss is GRANTED. The Plaintiff's Motion for Summary Judgment is DENIED. This case shall be STRICKEN from the docket of this court.

The Clerk of the Court is directed to send a certified copy of this Order to Plaintiff and all counsel of record.

ENTERED: /s/ Norman K. Moon
U.S. District Judge

August 9, 2007
Date

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

[Filed Apr 12, 2007]

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Civil Action No. 3:06-CV-00008

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THEODORE B. GOULD,
*Plaintiff,*

v.

UNITED STATES OF AMERICA, ET.AL.,
*Defendants.*

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OPINION AND ORDER

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Judge NORMAN K. MOON.

This matter is before the Court on the Plaintiffs Motion to Vacate, filed March 12, 2007, and two Motions for Judicial Notice, filed March 21 and 30, 2007. For the reasons given below, the Motions for Judicial Notice must be DISMISSED, but the Motion to Vacate will be GRANTED.

Plaintiff misunderstands the concept of judicial notice, which is a means of finding incontestible facts so as to save the court's and jury's time. *See* Fed. R. Evid. 201. The sorts of facts amenable to judicial notice are, for instance, the length of the U.S.-Canada border or the states through which the Mississippi River passes. *Id.* Plaintiff does not seek to

resolve such incontestible issues, but rather wishes to introduce documentary evidence supporting his theory of the case. Accordingly, this motion must be DISMISSED. However, mindful of the lenient standards to which pro-se litigants are held, and in the interests of justice, I have reviewed the Plaintiff's most recent submissions and considered their effects on this case.

The background of this case having been given in a previous opinion on February 20, 2007 (docket # 37), it will be omitted.

Plaintiff has clarified and simplified his claims, which originally consumed 337 paragraphs over 110 pages, in the instant Motion to Vacate. They can be summarized thus: 1) this action is not barred by *res judicata* because it concerns tax years 1997 and 1998, which have not been previously litigated, and 2) the more than $30 million paid in taxes for those years by Fred Stanton Smith, trustee of the Miami Center Liquidating Trust, should have been credited to Plaintiffs personal income tax account, making Plaintiff—whose personal tax returns show liabilities several orders of magnitude smaller—eligible for a tax refund of epic proportions. Plaintiff now claims not to dispute the liability or payment of taxes for the years 1985-1992, which were in issue in prior litigation. (Mot. Vac. at 9)

Since there is no evidence that the 1997 and 1998 tax years have been litigated in any court, *res judicata* cannot apply. Although it is possible that issue preclusion could bar some or all of Plaintiff's claims, that question was not briefed by the parties or considered by the Court. Accordingly, the Court's Opinion and Order, issued on February 20, 2007, is

VACATED. The case shall return to the active docket of the Court.

Plaintiff characterizes the error made in this case as the natural result of entering an order without a hearing. It is more accurate to characterize it as the natural result of a 110 page complaint replete with irrelevant factual allegations and unnecessary detail. The complaint was reviewed by several members of the Court's legal staff as well as by attorneys for Defendant, none of whom were able to divine that it concerned anything other than the previously-litigated issues. This impression was no doubt reinforced by literally hundreds of paragraphs setting out in detail all of the events of 1985-1992, including numerous allegations that certain events in those years were or were not taxable, and were or were not treated as taxable by various parties. A complete re-reading of the complaint by the Court after receiving the Motion to Vacate and with that motion in mind has not permitted it to discern the alleged focus on the 1997-98 tax years.

Accordingly, Plaintiff is hereby ORDERED, within 30 days of the entry of this order, to submit an amended complaint *not to exceed twenty pages in length* setting out a "short and plain statement" of Plaintiff's theory of recovery. This complaint should include (but need not be limited to): 1) the amount of money Plaintiff seeks, 2) the legal justification for that award (e.g., tax refund, compensatory or punitive damages, etc.) 3) whether or not Plaintiff challenges the *assessment* of taxes or concedes that taxes paid by the Trustee for 1997-98 were in fact owed to the IRS by *somebody,* 4) If the assessment is challenged, the grounds therefore and a proposed alternative assessment, and 5) some allegation or

explanation of the effect of Plaintiff's proposed tax changes on the rights of creditors who were entitled to distributions from the Miami Center Liquidating Trust. Plaintiff shall include only those factual allegations which are strictly necessary to justify his claim, and may make those allegations in general terms rather than spelling out each and every event by date. Failure to submit a complaint complying with this order in a timely fashion will result in dismissal of the suit with prejudice.

After the amended complaint has been filed, the government shall have 20 days to submit a responsive pleading. The pretrial order and stay on discovery entered in this case shall remain in effect until further order of the Court.

It is so ORDERED.

The Clerk of the Court is directed to send a certified copy of this Order to the Defendant and all counsel of record.

Entered: /s/ Norman K. Moon
U.S. District Judge

April 12, 2007
Date

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

[Filed Feb 20, 2007]

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Civil Action No. 3:06-CV-00008

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THEODORE B. GOULD,
*Plaintiff,*

v.

UNITED STATES OF AMERICA, ET. AL.,
*Defendants.*

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### OPINION AND ORDER

Judge NORMAN K. MOON.

This matter is before the Court on the Defendants' Motion to Dismiss, filed on May 5, 2006. For the following reasons, this motion is hereby GRANTED.

### BACKGROUND

Plaintiff's 110 page, 337 paragraph complaint may be fairly summarized thus: "I want my money back." This suit is the newest incarnation of a long line of tax litigation initially arising from the bankruptcy of Plaintiff and several related corporations after a failed real estate venture. The bankruptcy estates were consolidated and the assets of those estates was vested in a liquidating trust. After the trustee filed an adversary suit to determine his tax obligations, the Supreme Court eventually ruled that the trustee

must pay tax on the income attributable to the trust property. *Holywell Corp. v. Smith,* 503 U.S. 47, 52 (1992). On remand, the bankruptcy court determined the tax consequences of the bankruptcy reorganization plan, and that decision was affirmed by the district court and the Eleventh Circuit, *In re Holywell Corp.,* 177 B.R. 991 (S.D. Fla. 1995), *aff'd,* 208 F.3d 1009 (11th Cir. 2000) (unpublished).

Since that confirmation, Plaintiff has filed at least two other lawsuits in this district (97- CV-131-C, aff'd by the Fourth Circuit, 99-1399, and 3:98CV107, aff'd by the Fourth Circuit, 99-2113) and at least two in the Southern District of Florida seeking refunds of taxes and now money damages based on various theories. Defendant asserts that the issues raised in the instant suit fail to state a claim on which relief can be granted because they are barred by res judicata.

STANDARD OF REVIEW

As this Court has previously stated, "[t]he purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint," not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards v. City of Goldsboro,* 178 F.3d 231, 243-44 (4th Cir. 1999). In considering a Rule 12(b)(6) motion, a court must accept all allegations in the complaint as true, must draw all reasonable inferences in favor of the plaintiff, and should not dismiss unless the defendant demonstrates "beyond doubt that the plaintiff can prove no set of facts in support of [the plaintiff s] claim" that would allow the plaintiff relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see also Edwards,* 178 F.3d at 244; *Warner v. Buck Creek Nursery, Inc.,* 149 F. Supp. 2d 246, 254-55 (W.D. Va. 2001). Stated differently, a "court may

dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002).

Although a motion filed under Rule 12(b)(6) "should be granted only in very limited circumstances," *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir. 1989), a plaintiff still "must sufficiently allege facts to allow the Court to infer that all elements of each of his causes of action exist," *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 344-45 (4th Cir. 2006), *reh'g en banc denied,* 467 F.3d 378 (4th Cir. 2006); *see also Inman v. Klöckner-Pentaplast of America, Inc.*, No. 3:06cv00011, 2006 WL 3821487, at *4 (W.D. Va. Dec. 28, 2006) (collecting *post-Swierkiewicz* holdings in Rule 12(b)(6) cases in the Fourth Circuit). Res judicata justifies granting a 12(b)(6) motion because even where the Plaintiff can plead and prove a redressable injury, the fact of a prior judgment prevents a court from providing any relief.

## DISCUSSION

A party invoking res judicata must establish (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of the parties or their privies in the two suits. *Gould v. United States,* 229 F.3d 1142, *1 (4th Cir. 2000) (unpublished); *Meekins v. United Transportation Union,* 946 F.2d 1054, 1057 (4th Cir. 1991). Plaintiff does not dispute the first or the last element, but points out that his "cause of action" in the instant suit is different from those of previous suits because this complaint purports to be a bill in equity alleging fraud rather than a suit at law challenging the calculation of taxes.

This subtle distinction does not avail Plaintiff. The Fourth Circuit has adopted a transactional approach to determining the identity of claims: under this standard, the court inquires whether the new claim arises out of the same transaction or core of operative fact as the claim resolved by the previous judgment. *Id* at 1058.

This doctrine means simply that a Plaintiff must bring all of his arguments to the table at one time in one suit, or risk losing them forever. Put another way, res judicata bars not only claims actual litigated, but claims which *could have been* litigated. *Brown v. Felsen*, 442 U.S. 127, 131 (1979), *Meekins*, 946 F.2d at 1057. A tort victim must allege both intentional and negligent injury, or accept that one of his claims will never be heard. A taxpayer must allege both error and fraud by the IRS, or content himself with only one for all time. A bankrupt must make all possible objections in bankruptcy court, for he will not be later heard to complain of it. In no case is a second, much less a third or fourth, lawsuit permitted on a new theory after the first fails. Styling a case as "equitable" rather than "legal" does not permit a violation of this rule, especially as such nice distinctions were abolished nearly 70 years ago. Fed. R. Civ. Proc. 2.

There is but one transaction in this suit: the calculation of the liquidating trust's tax liability as part of the bankruptcy plan. That question was settled by the confirmation of the plan and the associated litigation and cannot be relitigated here.[1] To the extent

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[1] The confirmation of a plan by a bankruptcy court has the same res judicata effect as a judgment on the merits. *Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938), *In Re: Varat Enterprises, Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996).

that any ancillary issues might have existed, they were either settled by that Florida litigation, if raised explicitly, or are barred because they were not so raised at the appropriate time.[2] Indeed, had Plaintiff bothered to read the opinions authored by this very Court or those of the Fourth Circuit in his prior cases, he would already have known this.

As a final aside, although it was not briefed by the parties, there is reason to doubt that a suit in equity could be maintained some 13 years after the confirmation of the tax settlement in bankruptcy court. Laches will bar relief of even meritorious claims when the claimant has slept on his rights, if the defendant can show both lack of diligence and prejudice. *Costello v. United States,* 365 U.S. 265, 282 (1961).

CONCLUSION

To put in plainly, Plaintiff cannot have his money back, and there is neither any theory of recovery or any set of facts which can possibly change that result.

The Motion to Dismiss is GRANTED.

The Clerk of the Court is directed to send a copy of this Order to Plaintiff and all counsel of record.

Entered: /s/ Norman K. Moon
U.S. District Judge

2/20/07
Date

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[2] Plaintiff's claim that taxes paid were not credited to the appropriate account was addressed by the proposed settlement attached to Defendant's motion as Exhibit 1, page 5, paragraph 13(B)(3), denying Defendant and his corporation tax carryovers except as stated therein.

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

[Filed Aug 10, 2006]

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CIVIL ACTION NO. 3:06-CV-00008

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THEODORE B. GOULD
*Plaintiff,*

v.

UNITED STATES OF AMERICA, ET.AL.,
*Defendants*

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ORDER

Judge NORMAN K. MOON.

This matter is before the Court on Plaintiffs motion of July 27, 2006, styled "Motion For Granting Judicial Notice." In the motion, Plaintiff asks the Court to take judicial notice of a 1910 Harvard Law Review article on the availability of equitable relief. Plaintiffs motion appears, in fact, to be an attempt to induce the Court to accept Plaintiffs theory of the case, and thus is not a proper motion for judicial notice, even if such motion were appropriate at this time. This motion is accordingly DENIED.

It is so ORDERED.

The Clerk of the Court is directed to send a copy of this Order to all counsel of record.

ENTERED: /s/ Norman K. Moon
U.S. District Judge

August 10, 2006
Date